

This Opinion is Not a
Precedent of the TTAB

Mailed: January 11, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Energy Beverages LLC

v.

Burner Water Beverages Ltd.
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Opposition No. 91253791

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Steven J. Nataupsky, et al. of Knobbe, Martens, Olson & Bear, LLP
for Energy Beverages LLC

Roberto Ledesma of the Law Office of Roberto Ledesma
for Burner Water Beverages Ltd.
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Before Greenbaum, Adlin and Hudis, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Burner Water Beverages Ltd. seeks to register the mark
BURNERWATER, in standard characters, for:

dietary supplements for promoting weight loss and fat
burning; dietary supplements for general health and well-
being; dietary supplement beverages for promoting weight
loss and fat burning, in International Class 5;

flavored drinking water; vitamin enhanced flavored
drinking water; beverages in the nature of flavored
drinking water containing nutritional and dietary

supplements for promoting weight loss and fat burning, in International Class 32; and

online retail store services featuring flavoured drinking water, in International Class 35.¹

In its amended notice of opposition, 12 TTABVUE,² Opposer alleges that it manufactures beverages, and pleads ownership of applications to register the standard character marks BURN for “non-alcoholic beverages, namely, energy drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs” and BURN ENERGY DRINK (“ENERGY DRINK” disclaimed) for “non-alcoholic beverages, namely, soft drinks, energy drinks, sports drinks, flavored waters, and fruit juice drinks.”³ As its sole ground for opposition, Opposer alleges that Applicant did not have a bona fide intent to use its mark for any of the identified goods or services at the time it filed its involved application.⁴ In its answer, Applicant denies the salient allegations in the amended notice of opposition. 13 TTABVUE.

¹ Application Serial No. 87216857 was filed on October 26, 2016 under Trademark Act Sections 1(b), 15 U.S.C. § 1051(b), based on Applicant’s alleged bona fide intent to use the mark in commerce, and 44(d), 15 U.S.C. § 1126(d), with a claim of priority based on a Canadian application (the filing basis was later amended to Section 44(e), 15 U.S.C. § 1126(e), based on Canadian Registration No. TMA1062397).

² Citations to the record are to TTABVUE, the Board’s online docketing system. Specifically, the number preceding “TTABVUE” corresponds to the docket entry number(s), and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

³ Application Serial Nos. 87904189 and 88290242, respectively. Opposer also pled ownership of application Serial No. 87904200, but that application has been abandoned.

⁴ Opposer’s original notice of opposition also pled abandonment as a ground for opposition, but in denying Opposer’s motion for summary judgment, the Board pointed out that “abandonment is not an available ground in opposition proceedings against” applications filed under Sections 1(b) or 44 of the Act. 11 TTABVUE 3.

I. The Record

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. In addition, Applicant introduced:

Testimony Declaration of Jordan McKinnon, its founder, Chief Executive Officer and President, and the exhibits thereto ("McKinnon Dec."). 15 TTABVUE.

Opposer introduced:

Notice of Reliance on its pleaded applications, Applicant's initial disclosures and discovery responses, and Internet printouts ("Opp. NOR"). 14 TTABVUE.

Transcript of cross-examination on written questions of Mr. McKinnon ("McKinnon Cross Tr."). 25 TTABVUE.

II. Entitlement to a Statutory Cause of Action

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020), *cert. denied*, 142 S.Ct. 82 (2021) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A plaintiff may oppose or seek to cancel registration of a mark when doing so is within the zone of interests protected by the statute and it has a reasonable belief in damage that would be proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020), *cert. denied*, 141 S.Ct. 2671 (2021) (holding that the test in *Lexmark* is met by demonstrating a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement, and a reasonable belief in damage by the registration

of a mark, which demonstrates damage proximately caused by registration of the mark). *Meenaxi Enter., Inc. v. Coca-Cola Co.*, 38 F.4th 1067, 2022 USPQ2d 602, at *3-4 (Fed. Cir. 2022) (“While the zone-of-interest test is not especially demanding ... it nonetheless imposes a critical requirement.”) (cleaned up).

Here, Opposer has not sufficiently pleaded, nor has it proved, that it is entitled to a statutory cause of action for lack of a bona fide intent to use.

A. Opposer Has Not Sufficiently Pled Entitlement

We turn first to Opposer’s original and amended notices of opposition (“NOO”). In the Original NOO, 1 TTABVUE, in support of its entitlement to a statutory cause of action, Opposer pled that it “is a manufacturer of beverages and believes that it will be damaged by registration of the Application. Opposer owns pending U.S. Trademark Application 85/949,314 for the mark BURN FULE [sic] YOUR FIRE (with design) for ‘non-alcoholic beverages, namely, carbonated beverages and energy drinks’ in International Class 32.” 1 TTABVUE 4 (Original NOO ¶ 2). Opposer attached to the Original NOO a printout of the pleaded application downloaded from a USPTO database. *Id.* at 8-10. It also alleged that registration of Applicant’s involved mark “will damage the integrity of the register in International Class 32,” without explaining how, and without explaining how “the integrity of the register” will affect Opposer. *Id.* at 5 (Original NOO ¶ 7). Finally, Opposer alleged that it is “arguably a potential competitor in the industry,” presumably meaning that it is “arguably” one of Applicant’s “potential” competitors in the beverage industry. *Id.* (Original NOO ¶ 8).

After the Board denied Applicant’s motion for summary judgment, in which Applicant pointed out that Opposer abandoned the application pled in its Original NOO, 11 TTABVUE,⁵ Opposer filed its Amended NOO. 12 TTABVUE. In its Amended NOO, Opposer again alleged that registration of the involved mark “will damage the integrity of the register,” without explaining how, and without explaining how the “integrity of the register” will affect Opposer. Opposer once again also alleged that it is arguably one of Applicant’s potential competitors in the industry. 12 TTABVUE 4 (Amended NOO ¶¶ 9, 10). But in the Amended NOO, Opposer did not re-plead its abandoned application Serial No. 85949314. Rather, it pled ownership of three different applications for standard character marks, all in Class 32: (1) application Serial No. 87904200 (BURN ENERGY (“ENERGY” disclaimed) for “non-alcoholic beverages, namely, energy drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs”); (2) application Serial No. 87904189 (BURN, also

⁵ Opposer points out, 26 TTABVUE 11, that the Board’s April 14, 2020 summary of the parties’ discovery conference indicated that the Original NOO “sufficiently pleaded [Opposer’s] standing” based on Opposer’s since-abandoned application Serial No. 85949314. 6 TTABVUE 7. That statement in the discovery conference summary is not relevant here. Indeed, the Original NOO is no longer operative and has been superseded by the Amended NOO, and the application pleaded in the Original NOO has been abandoned. In any event, to the extent the discovery conference summary constitutes an interlocutory ruling, “the Board panel to which the case is assigned for decision may review an interlocutory ruling and reverse it, if appropriate.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 518 (2022) (citing *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1832 (TTAB 2013) and *Harley-Davidson Motor Co. v. Pierce Foods Corp.*, 231 USPQ 857, 859 n.13 (TTAB 1986)). See also *Domino’s Pizza Inc. v. Little Caesar Enters. Inc.*, 7 USPQ2d 1359, 1363 n.9 (TTAB 1988) (“Th[e] statement [that evidence of third-party uses were relevant], made over the signature of a single interlocutory Attorney-Examiner of the Board, is not binding on this three-member panel, and we find ourselves in disagreement with the statement.”). To the extent doing so is necessary, we reverse any “interlocutory ruling” about entitlement to a statutory cause of action in the discovery conference summary for the reasons set forth below.

for “non-alcoholic beverages, namely, energy drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs”); and (3) application Serial No. 88290242 (BURN ENERGY DRINK (“ENERGY DRINK” disclaimed) for “non-alcoholic beverages, namely, soft drinks, energy drinks, sports drinks, flavored waters, and fruit juice drinks”). *Id.* at 3 (Amended NOO ¶¶ 2-4). Opposer attached to the Amended NOO printouts of the newly-pleaded applications downloaded from a USPTO database. *Id.* at 8-15.

Opposer did not sufficiently plead its entitlement to a statutory cause of action in either the Original NOO or the Amended NOO. Indeed, neither explains how or why Opposer, as a “manufacturer of beverages,” believes it would be damaged by registration of Applicant’s involved mark. Opposer’s allegation that it manufactures beverages is not enough, standing alone, to establish that a cause of action for lack of a bona fide intent to use is within Opposer’s “zone of interests.”

In fact, while Applicant also appears to be, or at least intends to become, a beverage manufacturer, and thus at least a potential competitor of Opposer, the Trademark Act does not protect against trademark registrations by competitors, unless those registrations would have harmful consequences falling within a plaintiff’s zone of interests. For example, the Trademark Act protects against a competitor’s registration of a mark which is likely to dilute a plaintiff’s mark, falsely suggest a connection with the plaintiff or be descriptive of or generic for goods or services which the plaintiff offers or desires to offer. But here, Opposer’s Original NOO and Amended NOO do not specify any of these types of interests, or any other

interest, in preventing registration of Applicant's mark. Put simply, the Trademark Act does not protect against registration of any and all marks owned by competitors. There must be something more to it, but Opposer has not explained what that might be.

Oftentimes, a plaintiff's allegations in support of its substantive ground for opposition or cancellation sufficiently plead that the cause of action (ground for opposition or cancellation) is within its "zone of interests." For example, in likelihood of confusion cases, allegations that the defendant's mark is similar to the plaintiff's, and intended to be used for related goods, may sufficiently allege that the cause of action is within the plaintiff's zone of interests. But here, Opposer's cause of action is for lack of a bona fide intent to use, not likelihood of confusion, and neither the Original NOO nor the Amended NOO allege that Applicant's mark is confusingly similar to Opposer's mark, or otherwise within Opposer's zone of interests. *Cf. Corcamore*, 2020 USPQ2d at *8 ("SFM alleges that because the goods sold under SFM's SPROUTS trademarks and Corcamore's SPROUT trademark are substantially similar, purchasers will believe that Corcamore's use of SPROUT is sponsored by SFM.").

The Original NOO and Amended NOO also do not state any basis for reasonably believing that registration of Applicant's mark would damage Opposer, because the mere registration of a competitor's or potential competitor's mark is not enough, without additional allegations, to sufficiently plead "a direct connection between the belief of damage and the" involved mark. *Id.* at *7 ("The direct connection between

the belief of damage and the registered mark suffices to demonstrate proximate causation.”).

Similarly, not only does Opposer fail to explain how registration of Applicant’s involved mark would “damage the integrity of the register,” but more to the point it also does not explain how or why Opposer believes it would be harmed if the “integrity” of the register was somehow “damaged” by registration of the involved mark. As the Federal Circuit pointed out in *Corcamore*, “a purpose of the real-interest test is to ‘distinguish [parties demonstrating a real interest] from mere intermeddlers or ... meddlesome parties acting as self-appointed guardians of the purity of the Register.” *Id.* at * 7 (quoting *Selva & Sons, Inc. v. Nina Footwear, Inc.* 705 F.2d 1316, 217 USPQ 641, 648 (Fed. Cir. 1983)).

Thus, Opposer has not sufficiently pleaded its entitlement to a statutory cause of action for lack of a bona fide intent to use.

B. Opposer Failed to Prove Entitlement

Even if Opposer had sufficiently pled its entitlement to a statutory cause of action, that would not relieve Opposer of its burden to prove it. *Philanthropist.com, Inc. v. Gen. Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, at *11 (TTAB 2021), *aff’d mem.*, 2022 WL 3147202 (Fed. Cir. 2022) (a plaintiff “must maintain its entitlement to the statutory cause of action throughout the proceeding and affirmatively prove its existence at the time of trial by introducing evidence to support the allegations in its pleading that relate to such entitlement as an element of its case-in-chief”). But here, Opposer introduced no evidence about itself, other than its

pleaded applications, leaving Opposer unable to prove its entitlement to a statutory cause of action.

Indeed, even if Opposer's allegations in the Amended NOO sufficiently pled its entitlement to a statutory cause of action, the applications introduced in support of its allegations of entitlement have "no probative value other than as evidence that the application was filed." *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010) (quoting *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002)). Moreover,

[t]he allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence Statements made in an affidavit or declaration in the file of an application for registration, or in the file of a registration, are not testimony on behalf of the applicant or registrant. Establishing the truth of these or any other matters asserted in the files of these applications and registrations shall be governed by the Federal Rules of Evidence, the relevant provisions of the Federal Rules of Civil Procedure, the relevant provisions of Title 28 of the United States Code, and the provisions of this part.

Trademark Rule 2.122(b)(2).

In other words, those applications do not establish that Opposer "is a manufacturer of beverages" or a potential competitor of Applicant. Nor can Opposer's pleaded applications establish that registration of Applicant's involved mark "will damage the integrity of the register," much less whether or how damaging "the integrity of the register" or registration of the involved mark will damage Opposer. In short, Opposer has not established that its alleged but unexplained and unproven

interests “have anything to do with trademark concerns (whether its own trademark concerns or concerns about how others’ trademark rights might endanger its business model).” *Philanthopist.com*, 2021 USPQ2d at *16.

III. Conclusion

Opposer has not sufficiently pleaded its entitlement to a statutory cause of action. Nor has it proven its entitlement to a statutory cause of action.

Decision: The opposition is dismissed.